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95-1612

Supreme Court, U.S.
FILED
MAR 25 1996
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden,
Petitioner,

v.

CHARLES EDWARD MOORE, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Where a district court grants habeas corpus relief in a capital case, orders the state to release or retry the defendant within 60 days, and refuses to stay the order, does the state moot its appeal by initiating new trial proceedings rather than releasing the defendant from its custody?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
ARGUMENT	5
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Cases	
Adamson v. Lewis 955 F.2d 614 (9th Cir. 1992)	6
Armant v. Marquez 772 F.2d 552 (9th Cir. 1985)	9
Cates v. Superintendent, Indiana Youth Center 981 F.2d 949 (7th Cir. 1992)	7
Church of Scientology v. United States 506 U.S. 9 (1992)	5
Eagles v. Samuels 329 U.S. 304 (1946)	7
Faretta v. California 422 U.S. 806 (1975)	2
Franklin v. Duncan 70 F.3d 75 (9th Cir. 1995)	6
Fritz v. Spaulding 682 F.2d 782 (9th Cir. 1982)	9
Garrison v. Hudson 468 U.S. 1301 (1984)	10

TABLE OF AUTHORITIES, CONT'D

Hamilton v. Vasquez 17 F.3d 1149 (9th Cir. 1994)	9
In re Blodgett 502 U.S. 236 (1992)	7
Johnson v. Riveland 855 F.2d 1477 (10th Cir. 1988)	8, 11
Johnson v. Smith 764 F.2d 114 (2nd Cir. 1985)	10, 11
Lynch v. United States Parole Com'n 768 F.2d 491 (2d Cir. 1985)	8
Maxwell v. Sumner 673 F.2d 1031 (9th Cir. 1982)	9
McCleskey v. Zant 499 U.S. 467 (1991)	8
Moore v. Calderon 56 F.3d 39 (9th Cir. 1995)	3
Murphy v. Hunt 455 U.S. 478 (1982)	5
People v. Burton 48 Cal.3d 843 771 P.2d 1270 258 Cal.Rptr. 185 (1989)	9

TABLE OF AUTHORITIES, CONT'D

People v. Moore
47 Cal.3d 63
762 P.2d 1218
152 Cal.Rptr. 494 (1988) 2

People v. Windham
19 Cal.3d 121
560 P.2d 1187
137 Cal.Rptr. 8 (1977) 9

Savage v. Estelle
924 F.2d 1459 (9th Cir. 1990) 9

Teague v. Lane
489 U.S. 288 (1989) 9

United States v. Smith
780 F.2d 810 (9th Cir. 1986) 9

United States v. Timberland Paving & Const. Co.
745 F.2d 595 (9th Cir. 1984) 8

Statutes

28 U.S.C.
§ 2253 2, 8
§ 2101(c) 2
§ 1254(1) 2

TABLE OF AUTHORITIES, CONT'D

Court Rules

Supreme Court Rules 13.1, 13.4 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No.

ARTHUR CALDERON, Warden, *Petitioner*,

v.

CHARLES EDWARD MOORE, JR., *Respondent*.

OPINIONS BELOW

A copy of the order of the United States Court of Appeals for the Ninth Circuit dismissing the state's appeal as moot is attached to this petition as Appendix A. A copy of the amended order dismissing both the state's appeal and Moore's cross-appeal as moot is attached as Appendix B. A copy of the order denying rehearing and rejecting rehearing en banc is attached as Appendix C.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit was filed on December 28, 1995. Apendix A. The amended order was filed on January 10, 1996. Appendix B. Rehearing was denied and rehearing en banc was rejected on March 5, 1996. Appendix C. This petition for writ of certiorari is filed within 90 days of the date rehearing was denied. 28

U.S.C. § 2101(c); Supreme Court Rules 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article III, section 2 of the United States Constitution provides, in pertinent part:

> 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution. . . .

Title 28, section 2253 of the United States Code provides, in pertinent part:

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

STATEMENT OF THE CASE

Following trial by jury in California in 1984, respondent Charles Edward Moore, Jr. (Moore) was convicted of two counts of first degree murder. The evidence at the penalty phase showed that he also committed a murder in Kansas shortly before the California crimes. Moore was sentenced to death.

The California Supreme Court affirmed the judgment of conviction in 1988, holding, *inter alia,* that Moore's motion to represent himself pursuant to *Faretta v. California*, 422 U.S. 806 (1975), which was made on the date his trial was scheduled to begin, was properly denied as untimely under established California law. *People v. Moore*, 47 Cal.3d 63, 78-81, 762 P.2d 1218, 152 Cal.Rptr. 494 (1988). On March 31, 1995, the district court granted a petition for writ of habeas corpus on

summary judgment of three of the 27 claims, finding, *inter alia,* that Moore's motion to represent himself was timely under Ninth Circuit authority, which employs a different test of timeliness from California, and therefore should have been granted.[1] Memorandum Decision and Order on Petitioner's Motion for Partial Summary Judgment on Claims A, B, and C, at 30-37. The district court found the *Faretta* error reversible per se and ordered petitioner Arthur Calderon, the Warden of the California State Prison at San Quentin (the state), to release Moore within 60 days unless the state granted him a new trial within that time. *Id.* at 54, 64-65.

The state filed a notice of appeal and requested a stay of the order, which was denied by the district court, the Ninth Circuit panel, and the Circuit Justice of this Court. In its 2-1 denial of the stay filed on May 26, 1995, the Ninth Circuit indicated that it would "shortly" issue an "expedited" briefing schedule for the appeal. *Moore v. Calderon*, 56 F.3d 39, 40 (9th Cir. 1995).

Faced with the alternatives of retrying Moore or releasing him from its custody,[2] the state chose to

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1. The district court also found that Moore was entitled to relief because the trial court erroneously denied his *Faretta* motion to represent himself at the guilt phase closing argument. The district court rejected Moore's claims that he was entitled to substitute counsel, co-counsel status, and a second attorney, and that he had a right to be present at calendar call; those findings are the subject of Moore's cross-appeal.

2. Moore has outstanding non-capital judgments in Kansas and Colorado, but neither of those states has ever lodged a detainer against him in California. Regardless whether Moore might have been released to a sister state, California has a strong interest in retaining custody of Moore under the 1984 judgment of death, as the state has no assurance that Moore would remain incarcerated if it releases him to a state in which he is not subject to the death penalty.

comply with the district court's order by initiating retrial proceedings while the appeal moved forward. The state also informed the Ninth Circuit that Moore had been granted a new trial. Response to Order Re: Appellee's Custody and Trial Status, filed July 20, 1995.

Seven months passed without the Ninth Circuit setting a briefing schedule, despite the state's request that it do so. On December 28, 1995, on its own motion and without any briefing, the Ninth Circuit summarily dismissed the appeal as moot because the state had granted Moore a new trial. Appendix A, B.

The state filed a timely petition for rehearing and suggestion for rehearing en banc on January 11, 1996. The Ninth Circuit denied rehearing and rejected rehearing en banc on March 5, 1996. Appendix C.

REASONS FOR GRANTING THE PETITION

By its order dismissing the appeal as moot, the Ninth Circuit establishes a rule that strips the state of its statutory right to appeal an unstayed order granting habeas relief unless it releases the defendant. Thus, as here, if the state declines to release a dangerous capital defendant convicted of three murders in two jurisdictions, but instead complies in good faith with the habeas order by granting the defendant a new trial, the state forfeits its right to appeal.

The Ninth Circuit's anomalous rule forces the state to choose between two equally untenable options: an appeal at the cost of the defendant's release, or the defendant's continued incarceration and retrial at the cost of appellate review. In addition, the rule violates the principle of comity, as it essentially makes unreviewable a single district judge's unstayed order striking down a judgment that has been affirmed by the state supreme court.

By granting certiorari in this case, this Court will have an opportunity to decide a previously unexplored jurisdictional issue that is of critical national importance, as it will determine what alternatives are available to the states in every case involving an unstayed order granting habeas relief. The state's dilemma is particularly acute in capital cases, where its obligation to protect the public is pitted against its interest in defending those criminal judgments in which the state has the greatest investment of public resources.

ARGUMENT

In this instance, the Ninth Circuit plainly misapplied the law pertaining to mootness by dismissing the appeal. *See* U.S. Constitution, art. III, sec. 2. Generally, a case becomes moot when the issues presented are no longer "live," or when the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology v. United States,* 506 U.S. 9, 12 (1992) (citation omitted). In applying this test, the reviewing court is concerned "only with the question whether *any* relief can be ordered," *id.* at 14 n. 6 (emphasis in original), not whether the appellant's claim is likely to be meritorious on appeal. *Id.* at 17. Thus, the availability of any "possible remedy" is sufficient to prevent an appeal from being moot. *Id.* at 13.

In the present case, the Ninth Circuit clearly can grant "effectual relief" to the state by reversing the district court's order granting the habeas petition and reinstating the state court judgment. As discussed below,

such relief is available regardless whether the retrial has occurred. The Ninth Circuit's conclusion that mootness has intervened to defeat its appellate jurisdiction is simply wrong.

At a minimum, the Ninth Circuit's finding of mootness is premature. Moore's motion to represent himself on retrial was granted on June 30, 1995. In the ensuing nine months, Moore has requested repeated continuances. At present, there is no trial date scheduled, let alone a verdict after retrial. "A habeas corpus petition is not moot 'until it can be said with certainty' that the state court judgment in question will not affect the petitioner's liberty." *Adamson v. Lewis*, 955 F.2d 614, 618 (9th Cir. 1992), *cert. denied*, 505 U.S. 1213 (1992) (appeal of district court's order granting writ was not moot where state entered into new plea agreement with defendant which required him to testify against others, but where those trials had not yet taken place). Therefore, under its own jurisprudence, the Ninth Circuit had no basis for assuming that it could not resolve the appeal before the retrial was completed.[3] Under any analysis, the appeal is not yet moot.

Next, even if Moore had already been retried, the state has a viable and ongoing interest in enforcing the 1984 judgment. If Moore is again convicted and sentenced to death, the second judgment will be subject to automatic appeal in state court and collateral attack in both state and federal courts, and will be final and

3. Indeed, based on the movement of contemporaneously docketed cases, if the Ninth Circuit had scheduled expedited briefing as it indicated it would do in May of 1995, the appeal might well have been decided by now. *See, e.g., Franklin v. Duncan*, 70 F.3d 75 (9th Cir. 1995) (district court granted writ on April 8, 1995; Ninth Circuit set expedited briefing schedule, heard oral argument, and filed opinion seven months later, on November 20, 1995).

enforceable only after years of litigation. The 1984 judgment has been litigated and upheld by the California Supreme Court on direct appeal and on state habeas corpus review, and is already 12 years further along the appellate path than a new judgment would be under the most expedited circumstances. The state has a compelling interest in avoiding the "severe prejudice" associated with delay in enforcing its judgments, *see In re Blodgett*, 502 U.S. 236, 239 (1992), not to mention the substantial expenditure of public resources necessary to pursue the second judgment -- a pursuit that would be wholly unecessary if the original judgment is reinstated on appeal. Thus, even if the state prevails on retrial, it nonetheless has a continuing interest in seeking "effectual relief" on appeal through reinstatement of the original judgment.

Further, the state's interest in appealing the original judgment is even more pressing if Moore receives less than a death sentence on retrial, because only an appeal can establish the lawfulness of the original judgment. If the district court's order is reversed on appeal, the parties will be restored to their original status, and retrial under the compulsion of an overturned order will have no effect. "Reversal undoes what the habeas corpus court did and makes lawful a resumption of custody." *Eagles v. Samuels*, 329 U.S. 304, 308 (1946); *cf. Cates v. Superintendent, Indiana Youth Center*, 981 F.2d 949, 952 (7th Cir. 1992) (where state releases prisoner on parole pursuant to unstayed grant of writ, appellate court "maintain[s] jurisdiction because of the state's interest in possibly restoring a defendant to custody").[4] Accordingly, appeal is the only avenue by

4. Nor would the nullification of an improperly ordered retrial suggest any injustice if Moore did obtain a better result in 1996 than in 1984. If the first trial was constitutionally fair, a subsequent

which the state can obtain "effectual relief" if Moore is not sentenced to death on retrial.

Moreover, the state's good faith compliance with a district court's order does not moot an appeal where the state continues to challenge the correctness of that order. *See, e.g., Lynch v. United States Parole Com'n*, 768 F.2d 491 (2d Cir. 1985) (Parole Commission's compliance with district court's order to hold new hearing did not moot appeal, where commission asserted that its original determination was valid and sought to reinstate it); *United States v. Timberland Paving & Const. Co.*, 745 F.2d 595, 598 (9th Cir. 1984) (appellant's payment of damage award pursuant to district court's order did not moot appeal). This is so because the state's compliance with an unstayed order is not the equivalent of conceding the underlying merits of the order or abandoning its challenge to that order. *See Johnson v. Riveland*, 855 F.2d 1477, 1483-84 n. 7 (10th Cir. 1988).

In the present case, the state has never abandoned its challenge to the district court's grant of the writ; the state initiated new trial proceedings solely under compulsion of the district court's unstayed order, without reason to believe that it was thereby forfeiting its right to appeal under 28 U.S.C. § 2253. To the contrary, the state has always maintained its strong interest in the appeal. The current conflict between California and the Ninth Circuit regarding the standard of timeliness for a *Faretta* motion exposes an untold number of state

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more favorable result has no constitutional significance. Indeed, a more favorable verdict on retrial could presumptively be attributed to the prejudice inherent from the delay of retrying a criminal defendant 12 years after the first trial, and 19 years after the crimes were committed. *See McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

convictions to reversal on federal habeas review. As the district court acknowledged in its opinion, only this Court or the Ninth Circuit sitting en banc can fully resolve this issue. Memorandum Decision and Order on Petitioner's Motion for Partial Summary Judgment on Claims A, B, and C, at 32 n. 24.[5]

Finally, our research has uncovered only one case remotely comparable to the Ninth Circuit's singular practice of dismissing the state's appeal from an unstayed

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5. The California Supreme Court has held that a defendant's motion to represent himself is timely, and therefore unconditional, when made "within a reasonable time prior to the commencement of trial." *People v. Windham*, 19 Cal.3d 121, 127-128, 560 P.2d 1187, 137 Cal.Rptr. 8 (1977). An untimely motion is addressed to the trial court's discretion in light of various factors. *Id.* at 128. In contrast, the Ninth Circuit holds that a *Faretta* motion is timely if it is made before the jury has been empaneled, unless it is shown to be made for the purpose of delay. *United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986). The California Supreme Court has expressly rejected the Ninth Circuit rule as being "too rigid in circumscribing the discretion of the trial court." *People v. Burton*, 48 Cal.3d 843, 854 & n. 2, 771 P.2d 1270, 258 Cal.Rptr. 185 (1989). However, without ever considering the "new rule" implications, *see Teague v. Lane*, 489 U.S. 288 (1989), the Ninth Circuit has applied its own rule to state cases on habeas corpus. *Savage v. Estelle*, 924 F.2d 1459, 1463 n. 7 (9th Cir. 1990); *Armant v. Marquez*, 772 F.2d 552, 555 (9th Cir. 1985); *Fritz v. Spaulding*, 682 F.2d 782, 784 (9th Cir. 1982); *Maxwell v. Sumner*, 673 F.2d 1031, 1036 (9th Cir. 1982); *but see Hamilton v. Vasquez*, 17 F.3d 1149, 1158 (9th Cir. 1994) (Ninth Circuit found that self-representation motions made "before trial, including one on the morning of trial," were untimely). Thus, in determining whether a *Faretta* motion is timely, the California trial courts are placed in the position of having to look to the California Supreme Court for precedent, and then to the Ninth Circuit for reversal.

habeas order as moot because of an intervening retrial.[6] In that decision, *Johnson v. Smith*, 764 F.2d 114 (2nd Cir. 1985), the finding of mootness was ultimately correct. However, the appellate court's discussion of the issue is faulty, and the circumstances underlying the finding are distinguishable from those here.

In *Johnson*, a non-capital case, the district court granted a habeas petition and ordered the state of New York to vacate the conviction or retry the defendant. The state appealed and unsuccessfully sought a stay of the district court's order. The defendant cross-appealed on an evidentiary claim which the district court had rejected. Rather than have the conviction vacated, the state retried the defendant and obtained a new conviction. Content with the conviction on retrial, the state moved to dismiss both its appeal *and* the defendant's cross-appeal on the ground of mootness. The defendant resisted the dismissal of his cross-appeal. *Id.* at 115-16.

The only disputed issue relating to mootness in *Johnson* concerned the defendant's cross-appeal, not the state's appeal, which the state elected to abandon in favor of the results of the retrial. The state thereby conceded the underlying merits of the district court's

6. In *Garrison v. Hudson*, 468 U.S. 1301 (1984), Chief Justice Burger granted an in-chambers stay of the defendant's scheduled retrial following reversal on habeas corpus. North Carolina argued that proceeding with the retrial would moot certiorari review. Without analysis or discussion, Chief Justice Burger accepted the state's position and stayed the retrial until this Court acted on North Carolina's pending petition for certiorari. However, California has never advanced such a position or conceded such a point in seeking a stay in this case. Further, at the very least, the order implies that an appeal does not become moot *before* retrial has occurred.

order and terminated its interest in any controversy. *Cf. Johnson v. Riveland*, 855 F.2d at 1483-84 n. 7 ("The State's concession and lack of challenge are distinguishable from those instances where the government . . . challenges the relief ordered by a prior court ruling and reserves its right to revoke such relief if the appellate review reverses the district court").

As to the defendant's cross-appeal on the evidentiary claim, the *Johnson* court correctly determined that it was moot after retrial. The court stumbled, however, when it applied the same reason for mootness to the *state's* appeal, finding, "Once retrial occurred, the appeal became moot, as did the cross-appeal, since they both raised hypothetical issues, the earlier trial no longer being the cause of Johnson's incarceration." 764 F.2d at 116. Plainly, the defendant's evidentiary claim was moot because, in the face of the retrial and conviction, the appellate court could grant the defendant no "effectual relief." However, no such circumstance limited the availability of appellate relief to the state; that appeal was moot only because New York voluntarily chose to abandon its interest in vindicating the original judgment. As discussed above, in this case California refuses to relinquish its interest in its appeal.

In sum, the Ninth Circuit has reached the indefensible conclusion that the state moots its pending appeal by granting a defendant a new trial in good faith compliance with a district court's unstayed order requiring a choice between retrial and release. However, this rule thwarts the state's right to defend its most serious criminal judgments. The state's paramount obligation to protect the public compels it to choose retrial in every case where the defendant has committed crimes of violence -- which includes all capital cases. Under the Ninth Circuit application of mootness, that choice divests the state of its statutory appellate rights,

thereby making unreviewable a district judge's order striking down a state judgment. Such an application ransoms public safety for the price of the state's right to appeal. In the process, the finality of state judgments is eroded, along with the most basic notions of comity and respect for the sovereign efforts of a coextensive state judiciary.

Certiorari is essential to establish that the state has a live interest in defending its judgments beyond the level of the district court. Regardless of the outcome of a retrial, the federal appellate court can grant "effectual relief" by reinstating the original state court judgment on appeal. This Court should grant the petition in order to resolve this important question of mootness.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: March 21, 1996.

Respectfully submitted,

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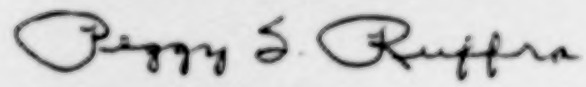

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APPENDIX A

Filed December 28, 1995
Cathy A. Catterson, Clerk
United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EDWARD MOORE, JR.,	)	Nos. 95-99009, 95-99013
Petitioner-Appellee/ Cross-Appellant,	)	D.C. No. CV-91-05976-KN
v.	)	DEATH PENALTY
ARTHUR CALDERON, Warden Respondent-Appellant/ Cross-Appellee.	)	ORDER

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Filed

Before: FERGUSON, O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

The State of California has granted petitioner Charles Edward Moore, Jr., a new trial. Accordingly, this appeal is DISMISSED as moot.

APPENDIX B

Filed January 10, 1996
Cathy A. Catterson, Clerk
United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EDWARD MOORE, JR.,	)	Nos. 95-99009, 95-99013
Petitioner-Appellee/ Cross-Appellant,	)	D.C. No. CV-91-05976-KN
v.	)	DEATH PENALTY
ARTHUR CALDERON, Warden Respondent-Appellant/ Cross-Appellee.	)	AMENDED ORDER

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Filed

Before: FERGUSON, O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

The State of California has granted petitioner Charles Edward Moore, Jr. a new trial. Accordingly, these appeals are DISMISSED as moot.

APPENDIX C

Filed March 5, 1996
Cathy A. Catterson, Clerk
United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES EDWARD MOORE, JR.,	)	Nos. 95-99009, 95-99013
Petitioner-Appellee/ Cross-Appellant,	)	D.C. No. CV-91-05976-KN
v.	)	DEATH PENALTY
ARTHUR CALDERON, Warden Respondent-Appellant/ Cross-Appellee.	)	ORDER

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Filed

Before: FERGUSON, O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges O'Scannlain and Fernandez have voted to reject the suggestion for rehearing en banc, and Judge Ferguson has so recommended.

The full court has been advised of the en banc

suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

ARTHUR CALDERON, Warden, *Petitioner*

v.

CHARLES EDWARD MOORE, JR., *Respondent*

CERTIFICATE OF SERVICE BY MAIL

THOMAS A. BRADY, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 50 Fremont Street, Suite 300, in the City and County of San Francisco, State of California; that on March 22, 1996, he served three true copies of the Petition for Writ of Certiorari in the above-entitled matter on the respondent by placing same in envelopes addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

Thomas A Brady

THOMAS A. BRADY
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